to fix prices vertically" (J. App. 73). One result of the adoption of the consignment plan was to spread the very limited price war throughout the Norfolk area (Pet. 8a, n. 10; J. App. 46).

The Commission, in an opinion (J. App. 66–77) which preceded this Court's decision in *Simpson* v. *Union Oil Co.*, 377 U.S. 13, found that Sun's consignment plan was a device for effecting both a vertical conspiracy between Sun and its dealers, and a horizontal price-fixing conspiracy among the dealers. It held that the horizontal aspects of the case distinguished it from *United States* v. *General Electric Co.*, 272 U.S. 476. Here, the "meetings organized by respondent provided the focal point for the dealers to gather and enter into at least a tacit or implied agreement with other participants as to the fixing of retail gasoline prices" (J. App. 74). It further found that the mere fact that not all of the dealers desired to adopt consignment did not negate conspiracy. The Commission noted that, as in *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, it was enough that the dealers accepted the invitation to participate in a plan whose known purpose and effect were to restrain trade. Finally, the Commission ruled in accordance with *United States* v. *Masonite Corp.*, 316 U.S. 265, that the price-fixing conspiracy was not privileged merely because effected through an agency arrangement.

The court of appeals affirmed in an opinion rendered after this Court's decision in *Simpson* v. *Union Oil Co., supra* (Pet. 1a–24a). It agreed with the Com-

mission that the horizontal aspects of the case distinguished it from *General Electric*, and that *Masonite* was controlling. The court deemed its position strengthened by this Court's decision in *Simpson*, even though neither it nor the Commission relied on the examiner's finding that Sun had coerced its dealers. (Pet. 18a–22a.) It expressed the view that the consignment plan in this case would be illegal under *Simpson* because "its evil—like the plan condemned in *Simpson*—is its inexorable potentiality for and even certainty in destroying competition in retail sales of gasoline by * * * 'consignees' who are in reality small struggling competitors seeking retail gas customers, 377 U.S. at 21" (Pet. 22a).

ARGUMENT

The decision below is clearly correct and the petition for certiorari presents no question warranting plenary consideration by this Court.

1. The Commission applied well settled principles to undisputed facts in finding that Sun engaged in an unlawful price-fixing conspiracy and its finding was, as the court of appeals held (Pet. 13a), supported by substantial evidence. Analyzing the evidence with respect to market conditions (J. App. 66–68), the dealer meetings with Sun, and the testimony as to what was said and done there (J. App. 68–72), the Commission concluded that Sun "acted as a necessary conduit and clearing house through which the dealers among themselves and in each other's physical presence could and did pledge to fix prices horizontally;

Sun, in the presence of the dealers, pledged to fix prices vertically" (J. App. 73); "Sun and its dealers wished and agreed to hold steadfastly to a uniform price line" (*ibid.*); they entered "horizontal arrangements which wiped out any slight opportunity for independent market action through price variances of any of its retail dealers" (*ibid.*); in short, the consignment arrangement was "a fiction and a subterfuge" (J. App. 75).

Since, in the circumstances, Sun did not employ consignment as a *bona fide* marketing method, but simply as a "means or method for effecting the price fixing scheme" arranged at the meetings between Sun and the dealers (J. App. 75), this Court's decision in *United States* v. *General Electric Co.*, 272 U.S. 476, is inapplicable; as stated in *United States* v. *Masonite Corp.*, 316 U.S. 265, the agency form may not be used by competitors as a price-fixing device. Moreover, the *Simpson* decision makes clear that a price-fixing scheme is not saved by adopting the consignment form of distribution. Petitioner argues that *Masonite* is distinguishable because the "consignees" in that case were manufacturers of products sold in competition with *Masonite* (Pet. 17). But such a narrow construction of *Masonite* is warranted neither by its facts nor by this Court's opinion. The facts in *Masonite* were that with respect to the patented hardboard (which was the product whose price was fixed), the "agents" were distributors, not manufacturers; and the decisive consideration in *Masonite* was that

the competing distributors, like the competing dealers here, "knowing that concerted action was contemplated and invited * * * gave their adherence to the scheme and participated in it" within the rule of *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 226. (See 316 U.S. 265, 275.) Both here and in *Masonite,* the horizontal price-fixing agreement among competing sellers made the agency arrangement unlawful despite the doctrine of the *General Electric* case.

In short, the decision below is clearly correct even assuming that *General Electric*—notwithstanding *Simpson*—retains validity with respect to consignment selling of non-patented products.

2. The question posed by petitioner as to whether the *Simpson* doctrine should be given retroactive application is not present in this case. The Federal Trade Commission's cease and desist order operates only prospectively; it does not involve any award of damages for past misconduct—the only situation in which this Court suggested, in *Simpson* (377 U.S. at 24–25), that a question of the fairness of retroactive application might arise. *Atlantic Refining Company* v. *Federal Trade Commission,* 344 F. 2d 599 (C.A. 6), certiorari denied, No. 558, Dec. 6, 1965. Moreover, as shown above, petitioner's conduct was clearly unlawful even under the law as it stood prior to *Simpson.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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